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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

On Petition for a Writ of of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS (APPELLANTS BELOW) IN OPPOSITION.

BERTRAM EDISES,
1440 Broadway, Oakland 12, California,
Attorney for Respondents.

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OPINIONS BELOW.

The opinion (R. 44-51) and findings of fact and conclusions of law (R. 69-79) of the District Court are reported in 61 F. Supp. 265. The opinion of the Circuit Court of Appeals (R. 204-213) is reported in 11 Labor Cases, parag. 63,424.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 5, 1946 (R. 214) and rehearing was denied December 5, 1946 (R. 215). Jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. § 347).

QUESTIONS PRESENTED.

1. Whether the Circuit Court of Appeals erred in holding that the so-called split-day method of wage payment, as applied by the petitioner, violated the Fair Labor Standards Act.

2. Whether the Circuit Court of Appeals erred in holding that the employees involved are not estopped from recovering overtime pay and liquidated damages by reason of the fact that the split-day plan was embodied in a collective bargaining agreement between petitioner and the representative of the employees.

3. Whether the Circuit Court of Appeals erred in reversing the decision of the trial Court.

STATUTE INVOLVED.

Section 7(a) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 207) provides under the heading "Maximum Hours":

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date,
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *"

STATEMENT.

The petitioner, Alaska Juneau Gold Mining Company, has for many years been engaged at Juneau, Alaska, in the mining, milling, smelting, sale and distribution of gold, silver, and lead. The respondents were employed by petitioner in various occupations connected with the mining and milling of its products.

Prior to the effective date of the Act, petitioner employed respondents on a daily (shift) basis. The

regular working day (shift) was eight hours. (R. 174.) However, respondents were paid proportionately for hours worked in excess of or fewer than eight, so that the daily wage was actually based on an hourly rate. Some of the respondents worked a 56-hour and some a 48-hour week. The respondents received the same hourly rate for every hour worked during a week regardless of the number of hours worked. There was no "overtime" rate paid for hours worked in excess of any given number per week. (R. 180.)

When the Act went into effect on October 24, 1938, petitioner continued to work the respondents 48 and 56 hours per week, i.e., six and seven 8-hour shifts. However, it reduced the respondents' basic rates of pay, so that when 44 hours (the statutory maximum) of straight-time pay was added to the number of hours per week paid for at overtime rates, the weekly compensation remained substantially what it was prior to the Act. (R. 143-144; 158.) In short, petitioner instituted a "Belo" type reduction. (*Walling v. Belo Corporation,* 316 U.S. 624.)

In October, 1939, petitioner, pursuant to an agreement with the Union which had shortly before this date been certified as the collective bargaining representative of petitioner's employees (R. 148), ceased to pay weekly overtime for work in excess of 44 hours and adopted a "split day" or "daily overtime" plan. (R. 150-151; Deft's Exh. F in evidence.) Under this plan the first seven hours of the shift were designated as "straight time" hours and the eighth hour was designated as an "overtime" hour. "Straight time"

rates of pay were established in an amount which, when added to the amount received for "overtime", would return to the worker, for an eight hour day, the same daily wage he had received prior to the effective date of the Act. (R. 158.) For example, workers who prior to the Act had earned $4.75 for an 8 hour day, were now paid a "straight time" hourly rate of 55.8¢. This rate was paid for the first seven hours, and time and one-half, or 84¢, was paid for the eighth hour. The total pay received for 8 hours of work was $4.75, the same as prior to the Act. In May, 1940, in anticipation of the reduction of the statutory workweek from 42 to 40 hours, the workday was redivided into 6.6 hours of "straight time" and 1.4 hours of "overtime." (R. 151.) The "straight time" rate of pay was again reduced so that, when added to the "overtime", the pay for eight hours work remained practically the same as before. Throughout these various adjustments of rates the regular shift remained at eight hours. (R. 132, 174.)

In December, 1940 the Regional Director of the Wage and Hour Division notified petitioner that the split-day plan of computing wages was in violation of the Act (R. 163-166) and on May 1, 1941, petitioner discontinued the plan. A stipulated judgment was entered in the United States District Court for the Northern District of California, Southern Division (*Fleming v. Alaska Juneau Gold Mining Company,* No. 21843-S) pursuant to which the employees were reimbursed for unpaid overtime compensation from the date of notification by the Wage and Hour Division to May 1, 1941.

The present action was instituted on April 23, 1943, by eleven named plaintiffs (by amendment eight additional plaintiffs were later joined) to recover unpaid overtime compensation and liquidated damages for the period from April 23, 1940, to May 1, 1941. Respondents have conceded that petitioner is entitled to a credit for the amount of overtime compensation paid pursuant to the consent decree mentioned above. The District Court held for petitioner. The Circuit Court of Appeals reversed and held that respondents were entitled to recover.

ARGUMENT.

1. That the "split-day" plan of wage payment and overtime calculation adopted by the Company was in violation of the Act is conclusively established by *Walling v. Helmerich & Payne,* 323 U.S. 37, which is controlling on all essential points. In that case, as in the instant case, the employer sought to satisfy the overtime requirements of the Fair Labor Standards Act by arbitrarily dividing the normal workday into segments, one of which was termed the "straight time" period, the other the "overtime" period. In both cases, the employer sought to credit the so-called overtime against the statutory obligation to pay time and one-half for all hours in excess of 40 (previously 42 and 44) hours per week. In neither case was the "overtime" true overtime, i.e., hours worked outside the normal or regular working hours. In both cases the employees were actually employed at two straight-time rates of pay, one applying to certain hours of the

normal work-day, the other applying to certain other hours of the work-day. Under these circumstances, as this Court pointed out in *Walling v. Helmerich & Payne, supra,* the "regular rate" on which overtime is computed under Section 7 of the Act is the average hourly rate for the week (or shift), ascertained by dividing the weekly earnings at both rates by the total number of hours worked. Cf., *Walling v. Alaska Pacific Consolidated Mining Co.,* 152 F. (2d) 812. By treating the lesser of the two straight-time rates as the "regular rate", and computing "overtime" thereon, petitioner's employees received somewhat less per week than they were entitled to receive under a correct computation of overtime.

2. It is well settled that agreement by employees or their representatives to a plan of wage payment which does not conform to the Act, creates no estoppel against the employees.

Overnight Transportation Co. v. Missel, 316 U.S. 572;

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590;

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697;

De Pasquale v. Williams-Bauer Corporation, et al. (CCA 2), 151 F. (2d) 178.

3. The issues in this case are neither novel nor of general significance. The petitioner, as stated above, abolished the split-day plan in the year 1941, as did other metal mines following the Administrator's ruling as to its illegality. (R. 163-166.) The effort to link this case with the soft coal miners cases (Peti-

tion for Cert., pp. 19-21), falls short. We are not aware that any of the United Mine Workers contracts now before this Court present the question of the legality of any overtime wage payment plan. Furthermore, the contract between the Bituminous Coal Operators and the United Mine Workers of America, as confirmed by the agreement with the United States Coal Mines Administration, specifically provides that "Seven hours of labor shall constitute a day's work". (*Collective Bargaining Contracts and Negotiations,* Bureau of National Affairs, 25 : 1), thereby showing conclusively that the seven hour day in the coal mines is not a mere device to get around the overtime provisions of the Act, and that time worked in excess of seven hours is true overtime work. Contrast the situation in the instant case where throughout all the various manipulations of "straight" and "overtime" rates, the regular working day remained eight hours, and was so designated in the collective bargaining agreements of the parties. (R. 132; Def's. Exhs. E, F, G, and H, in evidence.)

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated, Oakland, California,
January 29, 1947.

Respectfully submitted,
BERTRAM EDISES,
Attorney for Respondents.